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JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States,

October Term, 1905.

HENRY E. FRANKENBERG COMPANY,
Petitioner,

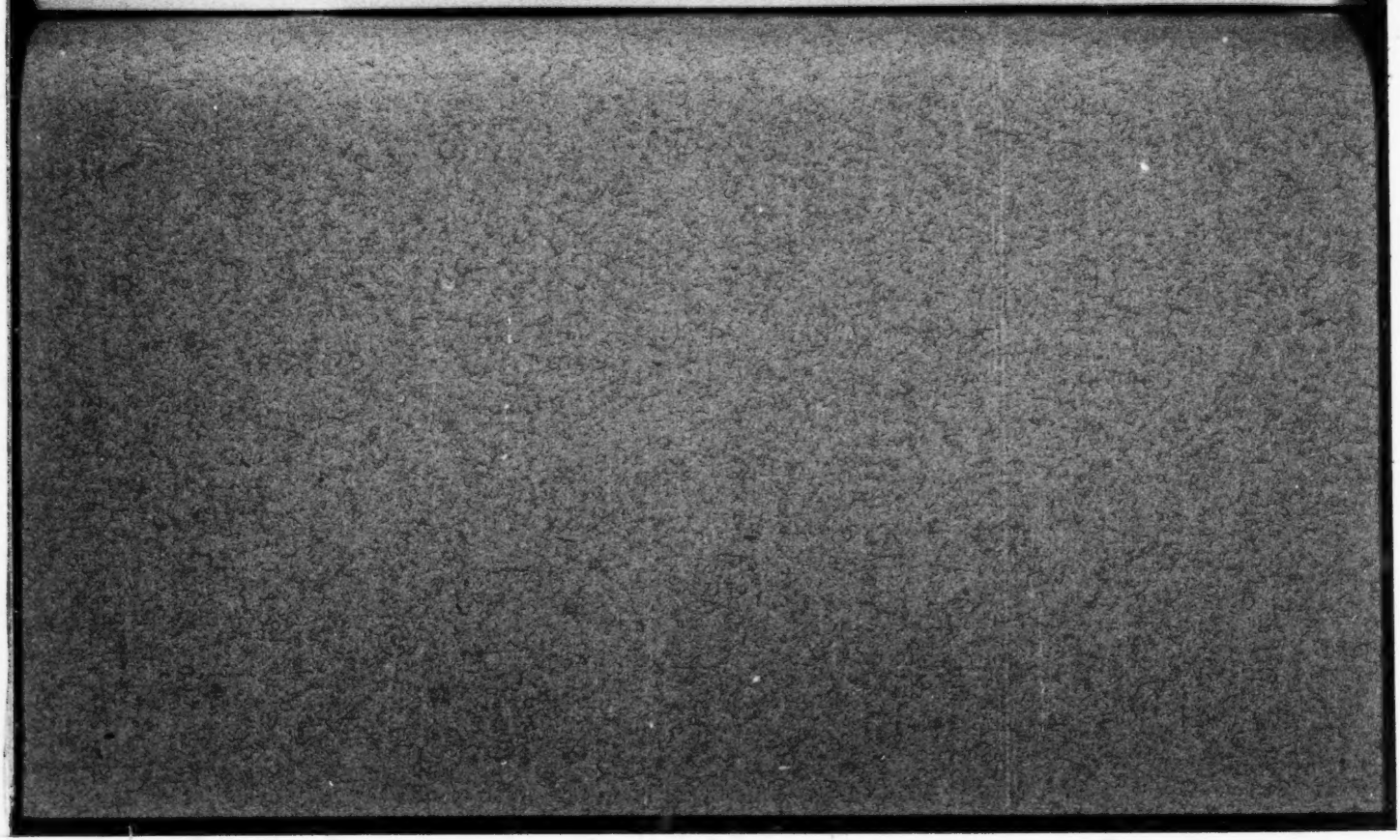
vs.

THE UNITED STATES,
Respondents.

No. 257.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

APPEAL PRINTING COMPANY, 14-16 VESEY ST., NEW YORK



In the Supreme Court of the United States.

OCTOBER TERM, 1905.

HENRY E. FRANKENBERG COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondents.

No.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit and Brief Thereon.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Statement of the Case.

Your petitioner, Henry E. Frankenberg Company, respectfully represents that the merchandise which is the subject of this proceeding, was certain metal beads

on cotton cords, which were imported subsequently to July 24, 1897, on which the Collector of Customs at the Port of New York, assessed a duty of 45 per cent. *ad valorem* under the provision in Paragraph 193 of the Tariff Act of July 24, 1897 (30 Stat., 151) for

> "articles or wares not specially provided for in "this Act, composed wholly or in part of * * * "metal, and whether wholly or partly manufac- "tured, forty five *per centum ad valorem.*"

Against this exaction of duty the importer filed protests claiming that the merchandise is specially provided for in Paragraph 408 of the same Tariff Act, as

> "beads of all kinds, not threaded or strung, "thirty-five *per centum ad valorem.*"

In due course the protests were transmitted to the Board of General Appraisers, who subsequently rendered a decision thereon, which will be found in the Record (pp. 29-35). For reasons which appear in the decision of the Board, the claims in the protests were overruled,and the action of the Collector was affirmed. The case was brought into the United States Circuit Court for the Southern District of New York for review, and that Court affirmed the decision of the Board (Record, p. 36). The case was then taken into the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decision of the Circuit Court, from which it will be seen that the goods in question are subject to the duty of 45 per cent. *ad valorem* as assessed by the Collector of Customs at the Port of New York as before noted.

BRIEF.

1.

The precise question involved in the litigation just mentioned has been decided by the Circuit Court of Appeals for the Seventh Circuit, in accordance with the claims of the petitioner, as appears from the decision of that Court in the case of the United States vs. Buettner, *et al.* (133 Fed. Rep., 163). In the decision of the case at bar in the Circuit Court of Appeals for the Second Circuit (Record, p. 46) it is stated by the Court that:

> "No new facts and no new arguments are pre-
> "sented which would require a different decision
> "in this cause. Reference is made to a decision of
> "the Circuit Court of Appeals in the Seventh Cir-
> "cuit, U. S. vs. Buettner (133 Fed. Rep., 163),
> "where the facts were apparently the same but the
> "conclusion reached different from that in the
> "Steiner case; and it is suggested that, in order to
> "secure an harmonious interpretation of the Tariff
> "Act we should reverse our former decision and
> "follow the Court in the Seventh Circuit. Inas-
> "much, however, as the decision of this Court was
> "first in order of time, that argument might more
> "properly have been addressed to the Seventh Cir-
> "cuit. Since we are not persuaded by the later
> "decision that we were in error in our first conclu-
> "sion, the better course would seem to be to ad-
> "here to our former ruling, leaving it to the
> "Supreme Court to secure uniformity by determin-
> "ing which of the conflicting constructions of the
> "paragraph is the correct one."

From this statement it would appear that the only

remedy of the petitioner herein to obtain relief from an assessment of duty which is believed to be erroneous, is to apply to this Court for a Writ of Certiorari to review the decision of the Circuit Court of Appeals on the question recently decided by them. The practical effect of these conflicting decisions is that the importer who does business within the jurisdiction of the Courts in the Second Circuit is compelled to pay a duty of 45 per cent. *ad valorem* on metal beads such as those in this case, while the importer who does business within the jurisdiction of the Courts in the Seventh Circuit is entitled to bring the very same kind of goods into this country upon the payment of an *ad valorem* duty of 35 per cent. This, it is submitted, is a grievance which is of sufficient importance to require the intervention of this Court.

This course was followed by the importers in the case of Chew Hing Lung & Co., petitioners, vs. John H. Wise (176 U. S., 156) where it appears from the decision that a Writ of Certiorari was granted and directed to the Circuit Court of Appeals for the Ninth Circuit on the allegation that there were inconsistent decisions in the Circuit Court of Appeals on this question.

The decision of the Circuit Court of Appeals for the Second Circuit, is substantially based upon the decision of the same Court in the Steiner case (79 Fed. Rep., 1003) which is a memorandum decision affirming the decision of the Circuit Court in the Steiner case (66 Fed. Rep., 726). In the latter decision it was stated that

"As I recollect the evidence the only testimony

> "before the board was to the effect that these are "strung beads; in fact a mere ocular examination "of them demonstrates that they are strung beads. "As there is no evidence to the contrary the Court "would hardly be justified in overruling the de- "cision of the board."

This Steiner case is mentioned in the decision in the Buettner case, *supra*, but was not followed for the reason that

> "The Court found, as a fact, that the beads were "threaded upon strings. This was the whole of "the finding. It was not disclosed whether the "threading was for purposes merely temporary, or "was permanent. For all that appears, the beads "in that case, may have constituted a completed "article of manufacture."

It would therefore seem that in the Buettner case the evidence was more extensive than that which appears from the decision to have been taken in the Steiner case; and this is one of the reasons why the case in the Second Circuit was not held to be a precedent for that in the Seventh Circuit.

2.

Your petitioner believes that the aforesaid decree of the Circuit Court of Appeals is erroneous, and that this honorable Court should require the said case to be certified to it for review and determination in conformity with the provisions of Section 6 of the Circuit Court of Appeals Act of March 3, 1891.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under

the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled Henry E. Frankenberg Company, appellant vs. The United States, appellees, No. 3770, to the end that the said case may be reviewed and determined by this Court, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable Court.

And your petitioner will ever pray,

HENRY E. FRANKENBERG COMPANY,
By FREDERICK W. BROOKS,
Attorney & Counsel for Petitioner.

City and County of New York, ss.:

Frederick W. Brooks, being duly sworn, says that he is the attorney for Henry E. Frankenberg Company, the petitioner above named, and as such had personal charge of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Southern District of New York, and in the United States Circuit Court of Appeals for the Second Circuit; that he has read the said petition by him subscribed, and

that the facts therein stated are true to the best of his information and belief.

FREDERICK W. BROOKS,
Attorney & Counsel for Petitioner.

Sworn to and subscribed before me, this eleventh day of April, 1906.

[SEAL.] John P. Eells,
Notary Public,
Kings Co.

Certificate filed in New York Co.

[9344]